SKI Leasing Sdn Bhd v Public Prosecutor & Ors

HIGH COURT (TAWAU) — CRIMINAL APPEAL NO 08 OF 1995
14 MARCH 1996
IAN CHIN J

Criminal Procedure *— Disposal of property — Release of seized property — Magistrate's order for release of seized property — Whether there is right of appeal against magistrate's order — Criminal Procedure Code ss 413 & 307*

Criminal Procedure *— Seizure of property — Whether sufficient ground to seize — Whether seizure lawful — Factors considered — Criminal Procedure Code ss 20 & 413*

The appellant claims to be the owner of three vehicles which were leased to one Pulumaju Sdn Bhd and upon default made by them, the three vehicles were seized by the appellant from the custody of one Peter Chia. Two of the vehicles were hired by the second respondent while the other one by the third respondent to the said Peter Chia. Three days later Peter Chia and another made a police report of the seizure. The appellant, through their servant also made a police report. Based on these reports, the police made a constructive seizure of the vehicles. The police thereafter reported the seizure to the magistrate. The magistrate, acting under s 413 of the Criminal Procedure Code ('the CPC') ordered that the vehicles be 'delivered temporary in possession' of the second and third respondent on the condition that a bond be deposited. The appellant now appeals against that decision of the magistrate. The issues before the court were (i) whether the seizure was lawful despite being carried out under s 20 of the CPC which was not applicable; (ii) who was entitled to the possession of the property seized; and (iii) whether there was a right of appeal from the magistrate's order.

Held, setting aside the magistrate's order and allowing the appeal:

(1) In this case there was sufficient ground for the police to suspect that an offence may have been committed as a result of the allegation that the chassis numbers had been tampered with. Therefore, it matters not that the police were erroneous in stating that the matter came under s 20 of the CPC since there was also the allegation that there was cheating which allegation would embody dishonesty, an element of cheating. The police were therefore justified in seizing and reporting the seizure of the vehicles to the magistrate pursuant to s 413 of the CPC (see p 188F–G).

(2) The fact that the appellant was last in possession was enough to tilt the balance in favour of the appellant, especially so when the second and third respondents were not able to establish that the possession by the appellant just before seizure by the police was unlawful, it being the law that the vehicles should normally be returned to the person from whom they were seized (see p 190A–C);

UMBC Finance Bhd lwn Amtek Motors Sdn Bhd & Satu Lagi [1993] 4 CLJ 428 followed.

(3) An order made by a magistrate under s 413 of the CPC can be appealed against or can be revised by the High Court. In any event, s 307 of the CPC does allow an appeal against an order of a magistrate made under s 413 (see p 192D); *UMBC Finance Bhd lwn Amtek Motors Sdn Bhd & Satu Lagi* [1993] 4 CLJ 428 distinguished.

[Bahasa Malaysia summary

Pihak perayu menyatakan bahawa mereka adalah pemunya tiga buah kenderaan yang telah disewa kepada Pulumaju Sdn Bhd dan atas keingkaran yang dilakukan oleh mereka, ketiga-tiga kenderaan itu telah dirampas oleh pihak perayu daripada penjagaan seorang yang bernama Peter Chia. Dua daripada kenderaan-kenderaan itu disewa oleh penentang kedua sementara yang satu lagi disewa oleh penentang ketiga kepada Peter Chia tersebut. Tiga hari kemudian, Peter Chia bersama seorang lagi telah membuat laporan polis mengenai perampasan tersebut. Pihak perayu, melalui pekerja mereka juga telah membuat laporan polis. Berdasarkan laporan-laporan ini, pihak polis telah membuat penyitaan konstruktif ke atas kenderaan-kenderaan itu. Pihak polis telah kemudiannya melaporkan penyitaan tersebut kepada majistret. Majistret, dengan bertindak di bawah s 413 Kanun Acara Jenayah ('KAJ') memerintahkan bahawa kenderaan-kenderaan itu dihantar-serahkan secara sementara ke dalam milikan penentang-penentang kedua dan ketiga atas syarat bahawa bon disimpankan. Perayu kini merayu terhadap keputusan majistret itu. Isu-isu di hadapan mahkamah adalah (i) sama ada penyitaan itu adalah mengikut undang-undang walaupun ianya dijalankan di bawah s 20 KAJ yang tidak terpakai; (ii) siapakah yang berhak kepada milikan harta yang disita; dan (iii) sama ada terdapat hak untuk merayu daripada perintah majistret.

Diputuskan, mengetepikan perintah majistret dan membenarkan rayuan:

(1) Di dalam kes ini terdapat alasan yang mencukupi untuk polis mengsyaki bahawa suatu kesalahan mungkin telah dilakukan oleh kerana penegasan bahawa nombor-nombor cesi telah diusik. Oleh itu, adalah tidak penting bahawa pihak polis telah tersilap dalam menyatakan bahawa perkara itu jatuh di bawah s 20 KAJ kerana juga terdapat penegasan bahawa terdapat penipuan, penegasan yang mana akan melingkungi ketidakjujuran, suatu unsur penipuan. Pihak polis adalah dengan itu mempunyai justifikasi untuk menyita dan melaporkan penyitaan kenderaan-kenderaan itu kepada majistret menurut s 413 KAJ (lihat ms 188F–G).

(2) Fakta bahawa perayu adalah yang terakhir sekali mempunyai milikan adalah mencukupi untuk menyendengkan imbangan

memihak perayu, terutamanya apabila penentang-penentang kedua dan ketiga tidak dapat mendirikan bahawa milikan oleh perayu sejurus sebelum penyitaan oleh pihak polis adalah tidak mengikut undang-undang, memandangkan adalah merupakan undang-undang bahwa kenderaan-kenderaan itu adalah biasanya dipulangkan kepada orang daripada siapa mereka disita (lihat ms 190A–C); *UMBC Finance Bhd lwn Amtek Motors Sdn Bhd & Satu Lagi* [1993] 4 CLJ 428 diikut.

(3) Suatu perintah yang dibuat oleh majistret di bawah s 413 KAJ boleh dirayu terhadap atau boleh disemak oleh Mahkamah Tinggi. Dalam apa-apa keadaan pun, s 307 KAJ membenarkan rayuan terhadap perintah majistret yang dibuat di bawah s 413 (lihat ms 192D); *UMBC Finance Bhd lwn Amtek Motors Sdn Bhd & Satu Lagi* [1993] 4 CLJ 428 dibeza.]

Notes

For a case on the release of seized goods, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1192.

Case referred to

UMBC Finance Bhd lwn Amtek Motors Sdn Bhd & Satu Lagi [1993] 4 CLJ 428

Legislation referred to

Criminal Procedure Code ss 20, 413(1), 517
Criminal Procedure Code s 452 [India]

Roderic Fernandez (*Shelley Yap Leong Tseu Chong Chia & Co*) for the appellant.

Zahir Hussein Ahmad Shah (Deputy Public Prosecutor) for the public prosecutor.

Francis Wong (*Peter Lo & Co*) for the second and third respondents.

Cur Adv Vult

Ian Chin J:

Introduction

On 10 August 1995 the learned magistrate, acting under s 413 of the Criminal Procedure Code, ordered to be 'delivered temporary in possession' of Cheah Yee Lee ('the second respondent') and Cheah Nget Min ('the third respondent') three vehicles on the condition of a bond of RM100,000 with RM2,000 to be deposited for each vehicle. The unsuccessful claimant for possession SKI Leasing Sdn Bhd ('the appellant') appeals against the order of the learned magistrate. The order was made based on statements made by Inspector Tan Bin Sing and after submissions by counsel for the

parties. The facts of this case leading to the order of the learned magistrate are these.

Facts of case, contentions and findings

The appellant claims to be the owner of the said three vehicles which were leased to Pulumaju Sdn Bhd and upon default made by Pulumaju Sdn Bhd the three vehicles were seized by the appellant on 28 October 1994, from the custody of one Peter Chia. At the time of the seizure, two of the vehicles were hired by the second respondent while the other one by the third respondent to the said Peter Chia. Three days later, Peter Chia made a police report of the seizure and on 9 November 1994, one Chia Kee Kiong also made a police report of the seizure. The appellant through their servant on 16 November 1994, also made a police report. What must have been the result of these police reports, the police on 22 November 1994, made constructive seizure of the vehicles which were then in Si Khiong workshop. The police thereafter reported the seizure to the magistrate, acting under s 413(1) of the Criminal Procedure Code ('CPC') which says:

> 413 Procedure by police on seizure of property
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> (1) The seizure or finding by any police officer of property taken under section 20 or alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the delivery of such property to the person entitled to the possession thereof, or, if such person cannot be ascertained, respecting the custody and production of such property.

This seizure by the police gives rise to the first of the several contentions. Mr Roderic Fernandez, learned counsel for the appellant, argued that the seizure was unlawful because the police had allegedly seized the vehicles under s 20 of the CPC when such was not applicable and neither was there any evidence, submitted learned counsel, for the police to say the vehicles were involved in cheating. Therefore, continued learned counsel, the learned magistrate had no jurisdiction to make an order under s 413 of the CPC. Mr Francis Wong, learned counsel for the second and third respondents, conceded that the police, given the circumstances in which the vehicles were seized, was clearly wrong in citing s 20 of the CPC which death with the seizure of arrested persons. But, Mr Wong submitted that the effect of the police report of Peter Chia averting to the taking away of the vehicles and that of the servant of the appellant alleging tampering of the chassis numbers of the vehicles is to provide sufficient ground for the police to suspect a crime had been committed and thus justified them to seize the vehicles and thereafter to resort to s 413 of the CPC. Mr Wong then referred the court to Dr Nun Lal *Code of Criminal Procedure* (1973) p 2790, which says:

> To act under this provision, what is required is not proof of the offence in respect of which the property is seized but whether the property was seized

in respect of an alleged offence or under suspicious circumstances. Once the seizure of property by any police officer is reported to the Magistrate under the provisions of the Code irrespective of the fact whether the investigation by the police disclosed an offence or not, the Court has to dispose of the property. While doing so, it has got absolute discretion to pass an order as it thinks fit respecting the disposal of such property. But, if it orders the delivery of the property, then it has to deliver it to the person entitled to the possession thereof. In such a case, it has to satisfy itself from the records and materials available before it that the person to whom the delivery is ordered is entitled to possession. If materials are not sufficient, it can make an enquiry into the matter by giving opportunity to the claimants before passing an order. In doing so, the Court should confine itself only to find out as to who is entitled to possession of the property but not the title of ownership thereof.

Normally in cases where the offence is not made out, the property should be delivered to the person from whom it is seized or taken. But it will depend upon the circumstances of each case. In such cases, the actual possession of the property at the time it was seized may be a relevant factor but not conclusive to determine the entitlement of such possession. The words used in Sec 457(1) [See 523(1), old], Cr PC, are 'The person entitled to the possession thereof'. Those words cannot be equated with actual possession. Nor can they be equated with the expression 'the person from whom the property is seized or taken'. A person may be in unlawful possession at the time it was seized though he has not committed the offence, and in that circumstance, it cannot be said he is entitled to possession. It must be a lawful possession. The test, therefore, is not the mere possession of property at the time of seizure, but as to who is entitled to lawful possession. The expression 'entitled to possession' is the *sine qua non* for the delivery of property under Sec 457 (Sec 523, old), Cr PC 1.

I am of the view that Mr Wong is correct in stating that in this case there is sufficient ground for the police to suspect that an offence may have been committed as a result of the allegation that the chassis numbers had been tampered with. What that allegation implies is that Peter Chia or whoever claiming though him came by the vehicles dishonestly as a result of the tampering of the chassis numbers. Therefore, it matters not that the police were erroneous in stating that the matter came under s 20 of the CPC since there was also the allegation that there was cheating which allegation would embody dishonesty, an element of cheating. The police were therefore justified in seizing and reporting the seizure of the vehicles to the magistrate.

Returning now to the facts of this case, the rival claimants had, at the hearing before the learned magistrate to determine who should get possession, produced two different sets of registration cards for the vehicles. At the time the vehicles were seized, they did not carry the registration numbers assigned to them by the registration cards. As for the appellant they claim that the three vehicles, which I will refer to as vehicles (1), (2) and (3), should bear the registration numbers, respectively, of MF2717, MB7663 and MC4058, and the registration cards produced by them state those numbers while the second and third respondents maintained that they should bear the respective numbers of ST4914A, ST4396A and ST9739A, and the registration cards produced by them state those numbers. The second and third respondents have used the respective numbers of

ST1378, ST138 and ST1788A for the said three vehicles instead of the said registration numbers stated in the registration cards. The government chemist in his report, was of the opinion that the chassis number of vehicle (1) had been tampered with, which chassis number could also be found on the part of the body of the vehicle under the driver's seat and the number there was not tampered with. The untampered chassis number under the driver's seat corresponds with that of the number stated in the registration card produced by the appellant. However, the engine number did not tally with that stated in the appellant's registration card but tallies with that of the registration card produced by the second respondent. Mr Wong submitted that since the chassis number and engine number tallies with those of the registration card produced by the second respondent, possession of vehicle (1) was was rightly given to the second respondent. However, he did not deal with the fact that the chassis number had been tampered with, which means that the registration card number did not tally with that of the vehicle which untampered number was under the driver's seat. Furthermore, the production number of this vehicle tallies with that shown in the registration card produced by the appellant. All these factors were not taken into account by the learned magistrate when he made the order giving possession to the second respondent. There is also the fact that this vehicle was already in the possession of the [appellant] before it was seized by the police. Given the circumstances, this vehicle (1) ought to have been ordered to be returned to the appellant, notwithstanding the fact that the engine number of this vehicle tallies with the registration card produced by the second respondent because, the tampering of the chassis number which resulted in the tampered number matching that of the number stated in the registration card produced by the second respondent, puts a sinister cloud over the bona fide of the second respondent's claim to possession. Even though the appellant's case is visited with the doubt that the engine number did not tally with their registration card, the preponderance of the factors, which I have already mentioned, favours possession being given to the appellant. Even more so, when it cannot be shown by the second respondent that the possession of the appellant, immediately before the seizure by the police, was unlawful, the law relating thereto I will avert to when I consider the position of the other two vehicles and what I will shortly say will be applicable here.

As for vehicles (2) and (3), the chemist was also of the opinion that the chassis numbers of these two vehicles had been tampered with. Therefore, as in the case of vehicle (1), reliance cannot be placed on the chassis number to establish a better right to possession, since the numbers could very well have been altered to suit the purpose of the registration cards produced by the second and third respondent. However, as is the case with vehicle (1), the engine numbers tally with that of the registration cards produced by the second and third respondent. On the other hand, the appellant was able to establish that the production numbers of the vehicles tally with that stated in the registration cards produced by them. Again, the learned magistrate did not take this factor into consideration. Even assuming that the factors are evenly balanced, because on the one hand you have matching engine numbers and on the other matching

production numbers, you still have the element of the tampering of the chassis numbers which tends to soil the claim of the second and third respondent for possession. Even assuming again that this tampering should not tilt the case in favour of granting possession to the appellant, then the fact that the appellant was last in possession was enough to tilt the balance in favour of the appellant, especially so when the second and third respondent was not able to establish that the possession by the appellant just before seizure by the police was unlawful, it being the law that the vehicles should normally be returned to the person from whom they were seized (Dr Nun Lal *Code of Criminal Procedure* (1973) p 2790; Sohoni *The Code of Criminal Procedure* (1973, 18th Ed) p 4840, cited in *UMBC Finance Bhd lwn Amtek Motors Sdn Bhd & Satu Lagi* [1993] 4 CLJ 428 at p 431).

Mr Zahir Hussein Ahmad Shah, learned deputy public prosecutor, would not support the decision of the learned magistrate and, in view of what I have said, it is a correct decision at that. However, the learned deputy had suggested that an enquiry should be conducted. I am of the view that such an enquiry is not necessary because I do not see any other light being thrown on this case that can favour granting the possession of the vehicles to the second and third respondents. In any event, this had not been urged by Mr Wong and it was not submitted as to what further evidence that can be elicited that may have a bearing on the outcome of this case.

Mr Wong had at the outset submitted that there was no right of appeal against the order of the learned magistrate and he further submitted that the appellant should have proceeded to obtain an order of certiorari. Mr Wong had referred to Dr Nun Lal *Code of Criminal Procedure* (1973) at p 2792, where it is said:

> There is no right of appeal to, or of revision by, the Session Judge under Sec 457 (Sec 523, old). A right of appeal is given under Sec 458 (Sec 524, old) but that is only against an order which is passed by the Magistrate that the property is to be at the disposal of the State Government on the ground that nobody has been able to establish his claim to the property and that the person, in whose possession it was found, has been unable to show that it was legally acquired by him. The Sessions Judge as a Court of Appeal or a Court of Revision cannot interfere with an order under Sec 457 (Sec 523, old) directing the house to be handed over to the person entitled to its possession on security.

Section 457 mentioned there is, according to Mr Wong, in pari materia with our s 413, and that passage is authority for saying that the order of the learned magistrate cannot be appealed against. However, in the same author's work at p 2785, it is said that the High Court has power in revision to interfere with orders passed under that section. Therefore, even if there is no right of appeal I would nevertheless have exercised my power of revision. But Mr Roderic Fernandez in reply said the High Court has jurisdiction which in fact was, according to Mr Roderic Fernandez, exercised in *UMBC Finance Bhd lwn Amtek Motors Sdn Bhd & Satu Lagi* [1993] 4 CLJ 428 which submission I cannot agree as far as what that case decides

A because the question the of the right of appeal was not raised in that case. Mr Roderic Fernandez then submitted that the right of appeal is conferred by s 307 of the CPC. First to the case of *Ghulam Ali v Emperor* which was referred in the passage cited by Mr Wong. That was a case where the police recovered from a petitioner a horse which the magistrate, upon the application of the petitioner, ordered to be returned to the petitioner upon B certain security. The respondent then applied to the magistrate for the 'restoration of the horse to him'. The magistrate after some enquiry ordered the horse to be 'made over' to the respondent but in the meanwhile, the horse was already returned by the police to the petitioner as originally directed by the magistrate. The petitioner then 'went in revision to the C learned Sessions Judge who, holding the order of the magistrate to be under s 517, Criminal Procedure Code, 'remanded' it for further enquiry. It was against this background that the court there passed the following judgment:

> D It seems to me that all the proceedings in this case subsequent to the original order of the Magistrate are illegal and without jurisdiction. Under s 517, no doubt, a Magistrate has the power to restore property to the possession of any party, but this is only at the conclusion of the enquiry or trial that has been held relating to the offence, with which the property is concerned. It is clear that there has been no such enquiry or trial in this case and, therefore, s 517 could never have come into operation. Moreover, even E if that section had been applicable, there is no ad hoc right of appeal or revision to the Sessions Judge. All that the Sessions Judge can do is to substitute his own order for that passed by the trial Court, if the substantive case comes before him as a Court of Appeal, or a court of revision. All that he can do in the case of an order which comes to his notice otherwise is to report it to the High Court for revision.
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> F But, as I have said, the order under consideration could not have been one passed under s 517. It could, however, be considered to have been one under s 523. But as I have already stated, the Magistrate had already passed an order which must be presumed to have been under this section when he directed the property to be made over to the petitioner on security. His second order therefore amounts to a review of this first order and a criminal G court cannot review its own judgment. It seems to me, however, that in this case the learned Sessions Judge would again have erred in assuming jurisdiction, for there is no right of appeal to, or of revision by, the Sessions Judge under s 523. A right of appeal is given under s 524 but that is only against an order which is passed by the Magistrate that the property is to be at the disposal of the Provincial Government on the ground that nobody has H been able to establish his claim to the property and that the person, in whose possession [it] was found, has been unable to show that it was legally acquired by him. The present order was not such an order and therefore s 524(2) did not give the learned Sessions Judge any jurisdiction.

When the court there said 'there is no ad hoc right of appeal or revision to the Sessions Judge' it was said in relation to s 452 of the Indian Criminal I Procedure Code which is in the following terms, viz:

> (1) When an inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction,

confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence. A

(2) An order made under sub-section (1) may be made under subsection (1) for the delivery of any property to any person claiming to be entitled to the possession thereof, without any condition or on condition that he executes a bond, with or without sureties, to the satisfaction of the Court, engaging to restore such property to the Court if the order made under sub-section (1) is modified or set aside, on appeal or revision. B

(3) A Court of Session may, instead of itself making an order under subsection (1), direct the property to be delivered to the Chief Judicial Magistrate, who shall thereupon deal with it in the manner provided in sections 457, 458 and 459. C

Also, when the court there referred to s 523 (Malaysia s 413) and said that there is 'no right of appeal to, or of revision by, the Sessions Judge under s 523', it was averting to a Sessions Judge not having that jurisdiction and not that an order made under that section cannot be appealed against. I am therefore of the view that an order made by a magistrate under s 413 can be appealed against or can be revised by the High Court. D

In any event, I am of the view that s 307 does allow an appeal against an order of a magistrate made under s 413. E

Therefore, the order of the learned magistrate given on 10 August 1995, is set aside and the three vehicles are to be delivered by the second and third respondents to the appellant at the Si Khiong Workshop from where they were originally removed within seven days hereof. Of course, this order does not in any way prohibit the second and third respondents, if they are so minded, from instituting proceedings against the appellant in the civil court relating to the vehicles. F

Appeal allowed.

Reported by Sally Kee Seok Meng G

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